Filed 2/3/03 Campagna v. Gatley Properties CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JAMES CAMPAGNA,

Plaintiff, Cross-Defendant and Respondent,

v.

H022749
(Santa Clara County
Super.Ct.No. CV769000)

GATLEY PROPERTIES, et al.,

Defendants, Cross-Complainants and Appellants,

KENNETH ARUTUNIAN, et al.,

Defendants, Cross-Defendants and Respondents.

_____/

This case involves a controversy regarding the rights and obligations under a commercial lease, as amended, and under a real estate purchase contract providing for purchase subject to the lease. The property involved is now commonly known as 234-238 Hamilton Avenue, Palo Alto. The Board of Trustees of the Leland Stanford Junior University (Stanford), one of the respondents, formerly owned the property and leased it to respondent Kenneth Arutunian, who developed the property for sublease. Appellant Gatley Properties, LLC (Gatley Properties) is the current owner and the landlord of the

property. Appellant Richard Gatley is the manager of Gatley Properties and the individual who negotiated the purchase of the property from Stanford.

The original lease established that the total rental was comprised of two components: (1) monthly base rent of $3,500 (to be adjusted annually), which was a fixed minimum rent, and (2) overage rent, which was essentially a percentage of the lessee's rental income. The lease provided for a 15-year term, which expired on June 30, 1999, and two options to renew, each for a period of five years. A 1986 amendment completely eliminated the annual adjustment of base rent and recognized certain past rent forgiveness. A 1987 amendment extended the 15-year term of the lease by four years, provided for base rent to be adjusted at the end of the fifteenth year of the lease term, and revised the renewal option to provide for two options to renew, each for a period of four years. The original renewal option and the amended renewal option both define "base rental rate" to be "the rate most prevalent in the marketplace for a comparable property" and further define "comparable property" as "a shell building and land."

Appellants attack the judgment, complaining that the trial court failed to provide full relief against Stanford for losses resulting from Stanford's misrepresentations regarding the lessee's rent obligations when it sold the property. Alternatively, appellants complain that the court erred in reforming the amended lease by eliminating "overage rent" as a component of the total rental after the fifteenth year of the lease and by defining "shell building" to mean the building in its 1984 dilapidated shell condition and assert that the amended lease was not reasonably susceptible to any such interpretation. Appellants also assert that reformation was barred on a number of other theories, including purchase of the property in good faith and for value (Civ. Code, § 3399), statute of limitations, estoppel, laches, and waiver. In addition, appellants maintain that the trial court's finding that the base rental payment upon adjustment was $7,620 per month was unsupported by the evidence and the judgment must be modified to provide for a monthly base rental payment of $12,000.

Respondent Kenneth Arutunian, the original lessee and assignor, and James Campagna, Arutunian's assignee, argue that the trial court properly exercised its discretion in declaring the parties' rights and obligations under the lease and appellant's "defenses" are without merit. Respondent Stanford maintains that the trial court did not find, and could not have found, any misrepresentation in the documents provided to Gatley by Stanford in executing the sale of the property.

We conclude that the trial court could not reform the lease to eliminate overage rent at the end of the fifteenth year of the lease term and could not determine that the adjusted base rent was a value below the range of values testified to by the valuation experts. We reverse.

A. *Procedural History*

Campagna filed a complaint for declaratory relief against Arutunian, alleging that, due to a typographical error, the 1987 amendment mistakenly stated that the base rent adjusted at the end of the fifteenth year of the lease term rather than at the end of the nineteenth year, as intended. Campagna filed a first amended complaint, adding Stanford and Gatley. Gatley Properties filed a cross-complaint for declaratory relief against Arutunian and Campagna. Campagna filed a second amended complaint against Arutunian, Gatley Properties, Gatley, and Stanford. The complaint requested declaratory relief regarding the rights and obligations under the lease as amended and reformation of the 1987 lease amendment to provide for adjustment of the base rental rate at the end of the nineteenth year of the lease. It also sought damages based upon promissory estoppel against Stanford. Gatley Properties filed an amended cross-complaint for declaratory relief, adding Stanford. Gatley Properties sought a judicial declaration that the monthly base rental rate adjusted to $18,000 effective July 1, 1999 and, in the event the base rental rate did not adjust to "fair market rent effective July 1, 1999," a judicial determination that Stanford was legally obligated to indemnify and/or pay damages to Gatley Properties.

Following trial, the court entered a judgment in accordance with its Statement of Decision. The court found, among other things: "The reference to 'shell building' in Article 20 of the Master Lease is a latent ambiguity. The subsequent testimony of non-percipient witnesses as to the original intent of Allen [*sic*] Lee [who negotiated the lease on behalf of Stanford] and Arutunian is uncontradicted. Only Arutunian testified as to his intent and his understanding of Stanford's intent. Therefore, the undisputed evidence is that 'shell building' is intended to be a building in its condition in June, 1984 prior to any improvements." The court also found that Norman Hulberg, Gatley Properties' expert, "unequivocally stated that the shell should be in the condition as the parties originally leased, yet he did not provide a damage calculation based upon the shell in this original condition."

The court declared that the $3,500 monthly rental rate adjusted to the "fair rental value for years 16-19." It concluded that that the shell building in its condition as of June 1984 had a fair rental value of $7,620 a month. The court directed Gatley to reimburse Campagna the difference between that fair rental value and $18,000, the monthly rental that Campagna had been paying since July 1, 1999. The court further declared: "The overage rent is no longer a component of rent once the rent goes to fair rental value. It is not to be paid after 15 years and not to be paid during the option period." The court determined that Gatley was "entitled to recover from Stanford the difference, if any, between the rent due [as found by the court] . . . and the rent due per the lease summary and/or estoppel certificate." The court also stated: "Since the Court will reform the contract, Gatley has recourse against Stanford for misrepresentation." The trial court otherwise found against plaintiff Campagna and against cross-complainant Gatley Properties.

B. *Evidence*

1. *The 1984 Lease*

Arutunian testified that, on about June 25, 1984 he entered a lease agreement with Stanford. The building on the property was a "fairly dilapidated structure" and Arutunian intended "[a] major upgrading of the building to make it usable for restaurant and offices." Article 1 of the lease described the premises as "[t]hat approximate 5,000 sq. ft. building plus mezzanine of approximately 1,000 sq. ft."

The lease agreement provided that the lease term would commence on July 1, 1984 and end on June 30, 1999. Article 16 of the lease agreement provided the following regarding rent: "16.1 Base Rent. Tenant agrees to pay Landlord as Base Rent for the premises Thirty Five Hundred Dollars ($3,500) monthly, in advance, on the first day of each month following completion of Tenant's planned remodelling and improvements and receipt of a Certificate of Occupancy from the City of Palo, provided that Tenant has, during the first sixty (60) days after execution and commencement of this Lease, obtained the appropriate permits from the City of Palo Alto to perform major renovations to the subject property, estimated to cost approximately $175,000, and further provided that the stated Base Rent shall commence on January 1, 1985 whether or not such improvements are completed. [¶] 16.2. Adjusted Base Rent. The amount of Base Rent payable hereunder shall be adjusted annually commencing on the first anniversary of the date of commencement of Base Rent as provided in section 16.1 above. At each successive anniversary beginning with the first anniversary, the Base Rent shall be increased six percent (6%). [¶] 16.3. Overage Rent. In addition to the Base Rent and adjusted Base Rent in section [*sic*] 16.1 and 16.2, Tenant shall pay to Landlord thirty-five percent (35%) of any gross rental income over $1.50 per square foot, excluding any recoveries for expenses, but including rental adjustments for cost of living, etc. received from subtenants. Annually, within twenty (20) days after the close of each calendar year, Tenant will furnish Landlord with a written statement certified as true and accurate by

Tenant setting forth by calendar month the total amount of gross rental income received by Tenant from subtenants during the preceding calendar year with a calculation of the overage rent due Landlord and accompanied by the annual overage rental payment."

Article 20 of the lease agreement provided for renewal options: "Tenant shall have two (2), five (5) year options to renew this Lease. The Base Rental rate shall be the rate most prevalent in the marketplace for a comparable property. Comparable property shall mean a shell building and land. Tenant, in order to exercise this option, shall give Landlord notice of his intent to exercise this option six (6) months before the termination of the initial term. Landlord and Tenant shall negotiate a mutually agreeable rental during the first three (3) months after the notice of intent to exercise is received by Landlord. If the Landlord and Tenant cannot agree on an appropriate rental during the three (3) month period, this matter will be submitted to arbitration, and Landlord and Tenant shall share the arbitration costs equally." The renewal provision did not explicitly provide for any modifications of the lease terms other than a change in base rental rate.

The lease expressly stated: "Tenant leases the entire building with the express purpose of redeveloping the building and subleasing space. . . . [¶] Tenant will sublease all of the building and submit any such leases for Landlord's approval." It provided that, when the lease term expired, "all additions, alterations and improvements" became the landlord's property.

At trial, Arutunian testified that, when he signed the lease in 1984, his understanding was that "shell building" as used in Article 20 "meant the building as [he] received it in 1984, before any improvements were made to it," in other words, a "dilapidated shell." He recalled reaching that understanding with Allan Lee, who represented Stanford, in a discussion before signing the lease.

2. *The 1986 Amendment*

In a letter, dated March 14, 1986 that proposed revisions to the lease, Ellen Smith, who had become the manager of Stanford's gift real estate department in approximately

1986, wrote to Arutunian: "We didn't discuss this change with you but if you ran the numbers out as the lease was written Stanford would eventually be getting all the rent. That just isn't the way any of us intended it to be. If you agree with this arrangement and the understanding of the changes just sign this letter and the amendment and return for our signatures."

In March 1986, Arutunian and Stanford executed a written amendment of the lease agreement. The 1986 amendment agreement acknowledged that the base rent payments for January and February 1985 had been totally forgiven by letter agreement and the base rent payment for March 1985 had been partially forgiven by another letter agreement. The agreement acknowledged that the overage rent had been forgiven through March 31, 1986 but expressly stated that "[o]verage rent begins on April 1, 1986 to continue through the term of the lease." The agreement deleted Article 16.2, which had provided for annual adjustment of the base rent, from the lease agreement. That agreement continued Article 16.3 regarding overage rent but deleted its reference to adjusted based rent. The agreement also stated in general: "These modifications shall be in force from the date of signing this lease through the term of the original lease."

At trial, Arutunian testified that it was his understanding when he signed the 1986 amendment agreement that, when he exercised the option as provided in Article 20 of the lease, he would have to pay market rent and there would be no overage rent.

3. *The 1987 Amendment*

In a letter, dated February 23, 1987, requesting modification of the lease, Arutunian wrote to Smith: "Article [30 of the Lease], in effect, allows the Lessee to claim the tax credit for building renovation. While the current Lease was for fifteen years with two, five-year options, according to my Accountants . . . the revised tax code requires an 18 year Lease from the time of substantial completion (Dec., 1984), or in effect, 18½ years from the time of the signing of the Lease." Arutunian's letter asked Stanford to extend the lease term.

In March 1987, Arutunian and Stanford executed a second written agreement amending the lease. This written agreement amended Article 2.1 by extending the lease term to 19 years, which made the lease expire on June 30, 2003. The agreement amended Article 20 to provide for two options to renew for four-year, rather than five-year, periods. Article 20 was also amended to read in pertinent part: "The Base Rental rate shall be adjusted at end of the fifteenth year of this Lease to the rate most prevalent in the marketplace for a comparable property." "Comparable property" was defined, as it had been in the original lease, to mean "a shell building and land." Like the original Article 20, the amended Article 20 required the landlord and tenant to "negotiate a mutually agreeable rental" and, absent timely agreement as specified, required them to submit the issue to arbitration. The agreement stated: "Except as hereby amended, all the terms, covenants and conditions of the Lease shall remain in full force and effect."

At trial, Arutunian testified that he believed that the rent was to remain fixed at $3,500 a month for 19 years because the 1987 amendment extended the term of the lease to 19 years. He acknowledged that he read the 1987 amendment regarding base rental rate adjustment and realized it stated "fifteenth year" but claimed he did not pick up on the fact it was a typographical error at the time. Arutunian confirmed that by "virtue of the 1987 amendment [he] understood that overage rent was applicable through the entire term of the lease ending as amended in 1987 on June 30, 2003."

At trial, Smith testified that she directed an in house attorney to draft the 1987 amendment. She stated that Stanford extended the lease term to allow Arutunian to take advantage of IRS rulings, which had nothing to do with the rent. As to the timing of the base rent adjustment, she testified that it was their intent to increase the base rent at the end of the fifteenth year and she specifically recalled instructing the legal department to make that clear. She indicated that language regarding the timing of the base rent adjustment was placed in the paragraph regarding the lessee's option to renew to make

clear that the base rent went up at the end of the fifteenth year, the end of the original term of the lease.

Smith explained that she had been previously mistaken when, in 1997, she had agreed with Arutunian's position that the base rental rate adjusted at the end of the nineteenth, rather than fifteenth, year and when, in her 1998 deposition, she reiterated that position and indicated that the 1987 amendment had misstated the year for the adjustment. She indicated that she made those earlier mistakes because she recalled Stanford's rent concessions to Arutunian, but did not realize the concessions had been addressed in the 1986 amendment because she did not have her full files or the 1986 amendment in front of her.

At trial, Smith further recalled that in 1997 she and Arutunian had also "discussed what a shell building would mean, and his understanding was that it would have been a building in the condition in which he had received the property, and I probably discussed with him at that time that . . . would probably be accurate." At trial, she indicated that was still her opinion.

4. *Sale of the Property*

During August 1990, Stanford entered into an agreement to sell the property to Commerce Communities Corporation; Gatley was its majority owner. Gatley negotiated the purchase of the property with Smith.

The real estate purchase contract made possession subject to the rights of tenants. The purchase was conditioned on, among other things, the buyer's inspection and approval of "any leases and/or tenant agreements." The contract required the seller to furnish the buyer, prior to the close of escrow, "estoppel certificates from current tenants in a form reasonably acceptable to Buyer."[1] It also provided that "Seller hereby

---

[1] Tenants' estoppel certificates are used in commercial real estate transactions to protect the buyer who is purchasing real property subject to leases. (*Plaza Freeway Ltd. Partnership v. First Mountain Bank* (2000) 81 Cal.App.4th 616, 628-629.) An estoppel

represents and warrants to Buyer" that "all documents delivered to Buyer by Seller pursuant to the terms of this Agreement are complete and as of their respective dates true and correct."

Stanford provided Gatley with a lease summary, which stated in pertinent part: "Lease extended to 19 yrs. from date of lease by Amendment dated 3/12/87, with two four [year] options to renew. Rent shall be adjusted at the end of the 15th year to marketplace comparables." It also indicated that rental included "35% of all gross rents over $1.50 to begin 4/1/86." Stanford also delivered the lease and the 1986 and 1987 amendments to Gatley.

Gatley prepared an estoppel certificate and provided it to Stanford for its review and correction if necessary. Arutunian signed the estoppel certificate, dated September 12, 1990. It stated that the current base monthly rental was $3,500. The estoppel certificate specified the rent forgiveness and indicated the lease had been amended in 1986 and 1987. As to the 1987 amendment, the estoppel certificate merely stated that Article 2.1 had been amended to extend the lease term to June 30, 2003 and Article 20 had been "amended to provide [for] two, four-year options to extend upon six months notice." The estoppel certificate stated: "This lease has not been modified, amended, or superseded (except as provided herein) . . . ." It concluded with Arutunian's acknowledgment and certification that "all statements herein may be conclusively relied upon by any prospective purchaser . . . ." The document expressly made the certification effective for a 30-day period.

---

certificate in which the tenant confirms the basic terms of the lease, including rent, estops the tenant from claiming otherwise after the sale is closed. (Cf. *Plaza Freeway Ltd. Partnership v. First Mountain Bank*, *supra*, 81 Cal.App.4th at p. 629.) In its statement of decision, the court finds that "Stanford and Gatley are estopped from asserting facts contrary to the content of the Estoppel Certificate." However, an estoppel certificate binds the signatory. (See *Plaza Freeway Ltd. Partnership v. First Mountain Bank*, *supra*, 81 Cal.App.4th at pp. 625-626, 629; see also Evid. Code, § 622.)

Stanford ultimately deeded the property to Gatley as trustee of his family's trust and Gatley's three children.[2] The property was transferred by the trust and Gatley's children to Gatley Properties.

5. *Lease Assignment*

Arutunian testified that he met with Smith on March 25, 1997 for the purpose of clarifying Article 20 as amended in 1987. At that time, Arutunian was in the process of negotiating the sale of his restaurant and was discussing the possibility of assigning the lease to Campagna. He testified that, at that meeting, Smith agreed that comparable property meant the unimproved premises as Arutunian had received them. Arutunian recalled sending a letter confirming their conversation to Smith. A letter to Smith from Arutunian, dated April 30, 1997, states in pertinent part: "Also, as per our conversation, it is my understanding that we agreed on the definition in the amendment of the phrase . . . 'comparable property shall mean a shell building and land . . .' as the shell building as I received it in 1984 with no improvements made to it."[3]

Campagna negotiated the purchase of Arutunian's restaurant, Caffe Verona,[4] on behalf his brother. Campagna agreed to take assignment of the lease and agreed to manage the day-to-day operations and leasing of the building. Under the assignment, Arutunian remained fully liable as the primary obligor under the Lease.

---

[2] Apparently, the arrangements were part of a real estate exchange for tax purposes.

[3] The letter also confirmed their conversation that the rent adjusted at the end of the nineteenth year rather than fifteenth year as stated in the 1987 amendment but, as mentioned, Smith testified that she subsequently realized she had been incorrect and took the position that 1987 amendment accurately provided for adjustment of the base rental rate at the end of the fifteenth year of the lease term. Arutunian testified that he confirmed with Smith his understanding that the monthly base rent of $3500 continued for the full 19-year term of the lease before assigning the lease to Campagna.

[4] Campagna testified that the restaurant occupies about 45 percent of the total square footage of the building.

6. *Rental Increase*

In a letter, dated May 26, 1999, Gatley informed Arutunian that the monthly base rental would be raised, effective July 1, 1999, to $18,000 and provided for further specified annual increases in the monthly base rental rate through June 2003. Apparently, under threat of eviction, Campagna tendered monthly payments of $18,000 and these payments were made and accepted with a full reservation of the parties' rights.

C. *Rules of Contract Construction and Standard of Review*

We apply well-established standards of contract construction and judicial review. " 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' (*Bank of the West v. Superior Court, supra,* 2 Cal.4th at p. 1264.)" (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868.) "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) The statutory rules of construction are applied for the purpose of ascertaining the intention of the parties to the contract. (Civ. Code, § 1637.)

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.) "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civ. Code, § 1644; see Civ. Code, § 1861.) "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense." (Civ. Code, § 1645.) "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civ. Code, § 1647; see Code Civ. Proc., § 1860.) "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the

promisor believed, at the time of making it, that the promisee understood it." (Civ. Code, § 1649.)

"The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [Citations.] [¶] A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.) A contract "ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning." (*Id*. at p. 40, fn. 8.)

"The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. (See Civ. Code, §§ 1635-1661; Code Civ. Proc., §§ 1856-1866.) Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. (Civ. Code, §§ 1638, 1639; Code Civ. Proc., § 1856.) It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. . . . 'An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation].' [Citations.]" (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866, fn. omitted.) "[I]t is only when conflicting inferences arise from conflicting evidence, not from uncontroverted evidence [from which conflicting

inferences may be drawn], that the trial court's resolution is binding." (*Parsons v. Bristol Development Co.*, *supra*, 62 Cal.2d at p. 866, fn. 2; see *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439.)

Thus, "where extrinsic evidence has been properly admitted as an aid to the interpretation of a contract and the evidence conflicts, a reasonable construction of the agreement by the trial court which is supported by substantial evidence will be upheld. [Citations.]" (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747.) Where there is no conflict in the extrinsic evidence, the appellate court must make an independent determination of the meaning of the contract." (*Parsons v. Bristol Development Co.*, *supra*, 62 Cal.2d at p. 866, fn. 2.)

D. *The Meaning of "Shell Building"*

In this case, extrinsic evidence revealed more than one possible meaning for "shell building" and extrinsic evidence was considered in interpreting that phrase, which affected the determination of the base rental rate.[5] Appellants contend that the court mischaracterized the testimony of Norman Hulberg, Gatley Properties' valuation expert. Appellants further assert that "[i]t is also not a reasonable interpretation of the Lease for the Judgment to hold that 'shell condition' means the 1984 pre-Lease condition of the Property before any improvements required by the Lease were made, rather than the current shell condition of the Property at the time that the particular adjustment of Lease Base Rent is to go into effect . . . ."

It appears the court did misconstrue Hulberg's testimony. Hulberg, a real estate appraiser, testified that, in his opinion, the monthly rental rate for a comparable property consisting of a shell building and land would be $3.29 per square foot, assuming that the

---

[5] The court impliedly found that there was no mutual mistake regarding the timing of the base rental rate adjustment that would warrant reformation of the amended lease. Appellants do not challenge the court's determination that the base rental rate adjusted at the end of the fifteenth year of the lease term.

base rental rate was flat over the four year extension term.[6] He indicated that his valuation was based upon his reading of the lease terms, which he understood meant the market rental value of the property as of July 1, 1999, the end of the fifteenth year of the lease, in a "vanilla shell" condition.

Hulberg explained that a "vanilla shell" typically includes very little in the way of interior improvements but would include a mechanical system, air conditioning, a leakproof and structurally sound roof, plumbing, and electrical supply to the building. He agreed that "an unreinforced masonry building, not earthquake retrofitted" that has "[a] roof which is not structurally sound, substandard electrical, substandard plumbing, no mechanical, no A/C" and that was "a drive-thru fuel and feed store"[7] is not a vanilla shell. Hulberg indicated there were other types of shells, such as a "cold shell" and a "frigid shell." He stated that a "cold shell" is "pretty much just the walls," perhaps a restroom, and electrical distribution but not a dropped ceiling. A "frigid shell" has fewer improvements than a "cold shell."

Arutunian's and Smith's testimony provided evidence that the phrase "shell building and land" as used in the original lease and the 1987 amendment was intended to mean the 1984 dilapidated condition of the premises prior to improvement.[8] Even if it might be implied from Hulberg's testimony that the word "shell" typically means "vanilla shell" when the word is used in commercial real estate, the court could properly find, based upon the conflicting extrinsic evidence, that the parties did not intend "shell" to have that particular meaning in their lease.

---

[6] Hulberg also testified that in his opinion the monthly rental rate would be $3.10 per square foot, assuming an annual 3 to 4 percent raise over a four-year period.

[7] That description roughly matched Arutunian's testimony concerning the condition of the property at the time he entered the lease.

[8] Contrary to appellants' repeated assertions, the evidence did not show any collateral agreement between Arutunian and Stanford directly contradicting the lease or the 1987 amendment.

"In this state . . . the intention of the parties as expressed in the contract is the source of contractual rights and duties. [Fn. omitted.] A court must ascertain and give effect to this intention by determining what the parties meant by the words they used." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co., supra*, 69 Cal.2d at p. 38.) The trial court could reasonably construe "shell building and land" to mean the property in its dilapidated 1984 condition as received by Arutunian and this court is bound by such an interpretation since it turns upon the credibility of conflicting extrinsic evidence. (*In re Marriage of Fonstein, supra*, 17 Cal.3d at pp. 746-747; *Parsons v. Bristol Development Co.*, *supra*, 62 Cal.2d 866, fn. 2.)

E. *Sufficiency of Evidence to Support Determination of Adjusted Base Rental Rate*

The court calculated the adjusted monthly base rental of $7,620 by multiplying the total square footage of 6,000 (the gross square footage, including mezzanine space) by a monthly rental rate of $1.27 per square foot. The court reached this figure by discounting the $2.00 per square foot rate, offered by Arthur Gimmy, Campagna's appraisal expert, by $0.73. The trial court noted in its statement of decision that $0.73 was the average upward adjustment made by Gimmy to the rental rates of comparable leases to account for mezzanine potential.

Appellants contend that Gimmy's testimony does not support the court's determination that the base rental rate was $7,620 upon adjustment in that it does not conform to Gimmy's opinion. Respondents Campagna and Arutunian argue that the trial court could properly reduce the $2.00 per square foot rate to eliminate Gimmy's upward adjustment for mezzanine potential because the court determined the property consisted of $6,000 rentable square feet, which already included the mezzanine.

Gimmy testified that his "assignment was to appraise the fair rental value of 234-238 Hamilton as of July 1, 1999, based on its condition as of July 1, 1984." He used the rental comparison approach. Gimmy determined, after considering the plans for converting the 1984 premises to a retail building, that the property in its 1984 condition

actually had about 4595 square feet of rentable square footage, as opposed to its exterior dimensions. Gimmy opined that, as of July 1, 1999, the fair rental value of the property in its shell condition was "$2 a square foot based on the ground floor square footage on a rentable basis." That $2 rental rate was based upon the "final adjusted rents" of comparable leases.

The monthly rents of comparable leases were adjusted for various differences, including a $1 per square foot reduction to bring the building to a "shell condition." Gimmy included in the final figures an upward adjustment consisting of 25 percent of the partially adjusted rent (adjusted for date of sale, terms, arm's length, and conditions) to account for the mezzanine potential. Gimmy testified that the original mezzanine space was "not really usable" and consisted of "just a platform." The 25 percent adjustment was made in recognition that the mezzanine space was "less desirable than ground floor space."

Respondent Campagna urges this court to uphold the trial court's determination, citing *City of Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384 and arguing that the court was "free to discount such factors as it saw fit in light of the evidence" and it was not bound by the precise numbers presented by the experts. In *City of Pleasant Hill v. First Baptist Church, supra,* 1 Cal.App.3d 384, 395-396, a condemnation action, one of the contentions was that the $47,000 severance damage award was not supported by the evidence. The plaintiff City's witnesses had indicated severance damages from none to $22,500 while the defendant church's witnesses had indicated severance damages from $83,800 to $98,450. (*Id*. at p. 441 [Appendix A].) The City asserted that "the jury must have indulged in speculation and conjecture because there is no testimony relating to that figure . . . , and no formula for computing damages was suggested which would produce it." (*Id*. at p. 408.) The court rejected a sufficiency of the evidence argument, finding that "[t]he fact that the jurors returned severance damages at a figure roughly half of that testified to by the church's witnesses does not invalidate the verdict" and

indicating that it was enough that the damage award was within the range of damages shown by the evidence. (*Id*. at p. 409.)

In this case, Gimmy offered the lowest value for the monthly market rental rate. Gimmy in effect opined that, as of July 1, 1999, the monthly market rental rate of the property in its 1984 shell condition was a total of $9,190, which was a monthly rate of $2.00 a square foot multiplied by the shell building's rentable square footage of 4,595 square feet. There was no evidence at trial that the building and mezzanine as it existed in its 1984 shell condition would have had a market rental value of $1.27 per square foot as of July 1, 1999.

Under Evidence Code section 813, subdivision (a), the value of property may be shown *only* by the opinions of (1) qualified witnesses, (2) the owner or spouse of the property or property interest, and (3) a knowledgeable designee of corporation, partnership, or unincorporated association, which owns the property or property interest.[9] "In assessing the opinions of the valuation witnesses, however, the trier of fact is not required to accept the testimony of any one witness in total, but may instead, after balancing and reconciling the various opinions of the witnesses and their bases, decide upon a value which falls within the range of the opinion testimony. [Citations.]" (*People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.* (1979) 91 Cal.App.3d 332, 346-347 [eminent domain action]; see *State of Cal. ex rel. State Pub. Wks. Bd. v. Wherity* (1969) 275 Cal.App.2d 241, 249 [in eminent domain action, "limitations set forth in [Evidence Code section 813] are to prevent evidence, otherwise admissible, from being used to

---

[9] Evidence Code section 810 now provides that the "special rules of evidence [are] applicable to *any action* in which the value of property is to be ascertained." (Italics added; see Stats. 1980, c. 381, § 1, p. 757 [removed limitation restricting rules to eminent domain and inverse condemnation proceedings].) Evidence Code section 811 provides: "As used in this article, 'value of property' means market value of any of the following: [¶] (a) Real property or any interest therein. [¶] (b) Real property or any interest therein and tangible personal property valued as a unit."

support a verdict *outside the range of opinion testimony*"]; cf. *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 889 [holding, prior to1980 amendment of Evidence Code section 813 making section generally applicable, that rule that "in condemnation cases any award must be within the range of the expert testimony if such testimony is the only substantial evidence in the case" was inapplicable to noncondemnation cases].)

In addition, "[i]t must be remembered that the facts stated as reasons for the opinion of the witness do not become evidence in the sense that they have independent probative value upon the issue as to market value. On the contrary, they serve only to reinforce the judgment of the witness, that is, they go to the weight to be accorded his opinion (*Long Beach City H. S. Dist. v. Stewart*, [(1947) 30 Cal.2d 763,] 773)." (*People v. Nahabedian* (1959) 171 Cal.App.2d 302, 310.) "[A] witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 619.)

Given the special rules applicable to the valuation of real property, we conclude that the court was not free to adopt a rental value that was below the range of values shown by the experts. The lowest possible adjusted base rental rate was $9,190 per month.

F. *Overage Rent*

It appears that the trial court's conclusions regarding overage rent were predicated on its finding that "Arutunian testified that the overage rent goes away when the property goes to market value." Arutunian in fact testified that "[t]here would be no overage rent" during the option periods because the rental "goes to market rate at that time." Arutunian maintained that the base rent was fixed at $3500 *plus overage rent* for 19 years.

Campagna now argues that the 1986 amendment limited overage rent to the original term of the lease, that is 15 years, and the plain language of the lease as modified provided that overage rent was payable only through the fifteenth year of the lease. He

further contends that "[t]he trial court was free to conclude . . . that the fundamental intent of the parties was that overage rent was not to be paid once the rent went to market, whenever that might occur."

In our view, the court's conclusion that overage rent terminated after 15 years of the lease is an interpretation of the lease to which it is not reasonably susceptible. The 1987 amendment extended the lease term by four years and expressly continued the terms of the lease, except as amended. The 1987 amendment did not expressly or impliedly discontinue overage rent during the sixteenth through the nineteenth years. The only change regarding payment of rent contained in the 1987 amendment was the language regarding the adjustment of the base rental rate. Under the 1987 amendment the new base rental rate took effect at the end of the fifteenth year of the lease just as it would have under the original lease if the renewal option was exercised. The provision in the 1987 amendment for renegotiating rent applied only to the exercise of the option to renew.

Moreover, the adjusted base rental rate does not reflect current full market value of the existing premises but merely the current fair market rate for the premises in their 1984 dilapidated shell condition. There is no provision for a yearly market adjustment of the base rental rate during the sixteenth through nineteenth years of the lease as demanded by Gatley. Thus, the adjusted base rental rate continues to be a fixed minimum rental based on the property without Arutunian's improvements. The lease as amended is most reasonably read as continuing the established rent structure, consisting of base rent (adjusted at the end of the fifteenth year) and overage rent, at least through the end of the nineteenth year of the lease.

In addition, the evidence did not establish a basis for reforming the lease to eliminate overage rent at the end of the fifteenth year. "The purpose of reformation is to correct a written instrument in order to effectuate a common intention of both parties which was incorrectly reduced to writing. [Citation.] . . . [¶] Reformation may be had

for a mutual mistake or for the mistake of one party which the other knew or suspected, but in either situation the purpose of the remedy is to make the written contract truly express the intention of the parties. Where the failure of the written contract to express the intention of the parties is due to the inadvertence of both of them, the mistake is mutual and the contract may be revised on the application of the party aggrieved. [Citation.] When only one party to the contract is mistaken as to its provisions and his mistake is known or suspected by the other, the contract may be reformed to express a single intention entertained by both parties. [Citations.] *Although a court of equity may revise a written instrument to make it conform to the real agreement, it has no power to make a new contract for the parties, whether the mistake be mutual or unilateral*. [Citations.]" (*Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 663-664, italics added.) There no evidence of a mutual or a unilateral intention to eliminate overage rent as a component of the total rent due during years 16 through 19 of the extended lease term that was incorrectly reduced to writing in the 1987 amendment.

As to overage rent during the renewal terms, Arutunian testified that it was his understanding that the overage rent was not a component of the rental during the renewal terms because he did not believe there was "anything in the lease that talks about overage rent in the option period." He believed that the rental during renewal terms would "not necessarily" include overage rent as provided by the original lease since "[t]he option period could be rewritten if it's to be negotiated between the parties." Article 20 of the lease, as it was originally written and as amended, clearly provides for renegotiation of the total rental.

In our view, the trial court's declaration that overage rent was "not to be paid during option period" was a premature determination. The lease term as amended does not end until June 30, 2003 and the renewal option has not been exercised in compliance with its terms. The option to renew requires "Landlord and Tenant" to "negotiate a

mutually agreeable rental" and to resort to arbitration if agreement cannot be reached.[10] Nothing in the language of the renewal option precludes overage rent as a component of any "mutually agreeable rental." The original option provision (Article 20), like the successor provision, refers to a "Base Rental rate," which suggests that the parties anticipated continuation of a rent structure similar to the one established by the original lease but did not lock the parties into a particular rental arrangement during any renewal term.

We conclude that the lease could not be reformed to eliminate overage rent after the fifteenth year of the extended lease term. In light of this conclusion, we do not reach appellants' remaining claims regarding the impropriety of reformation.

G. *Relief Against Stanford*

In its cross-complaint for declaratory relief, appellants requested a judicial determination that Stanford was legally obligated to indemnify and/or pay damages to Gatley Properties if the base rental rate did not adjust to fair market rent at the end of the fifteenth year of the lease based upon Stanford's express representations and warranties

---

[10] The trial court did not address whether the renewal option is sufficiently certain to be enforceable. "The general rule is that if an 'essential element' of a promise is reserved for the future agreement of both parties, the promise gives rise to no legal obligation until such future agreement is made. (*Ablett v. Clauson*, 43 Cal.2d 280, 284-285 [272 P.2d 753]; *City of Los Angeles v. Superior Court*, 51 Cal.2d 423, 433 [333 P.2d 745].)" (*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 405.) "[A]n option agreement which leaves an essential term to future agreement is not enforceable. [Citations.]" (*Ablett v. Clauson* (1954) 43 Cal.2d 280, 285.) Thus, where "[t]he only term fixed by the option provision as contemplated by a new lease is its duration" and "[a]ll of the other provisions are left to future agreement," "the terms of the option are too uncertain to make it enforceable as a contract right." (*Ablett v. Clauson*, *supra*, 43 Cal.2d at p. 286; see *Etco Corp. v. Hauer* (1984) 161 Cal.App.3d 1154, 1161 [lease provision for renewal at a rent to be determined in the future is enforceable only if the lease agreement contains an ascertainable standard for determining rent]; but cf. *Streicher v. Heimburge* (1928) 205 Cal. 675 [renewal option requiring parties to agree upon the rent to be paid during renewal term and providing for determination of rent by appointed appraisers if parties could not agree was enforceable].)

made in connection with its sale of the property. The trial court found in favor of cross-defendant Stanford except it found that Gatley was "entitled to recover from Stanford the difference, *if any*," between the adjusted base rental rate determined by the court and "the rent due per *the lease summary and/or estoppel certificate*" and found, apparently in regard to overage rent although it is not altogether clear, that "[s]ince the Court will reform the contract, Gatley has recourse against Stanford for misrepresentation." (Italics added.)

Appellants now assert that the court's reformation of the lease created meritorious claims for misrepresentation and breach of contract against Stanford for which the court failed to provide relief. Appellants specifically contend the court reformed the lease by (1) eliminating overage rent during years 16 through 19 of the lease term and during any renewal term and (2) defining shell building to mean the dilapidated condition of the property in 1984 rather than the improved shell condition of the property but then failed to determine Stanford's resulting liability for these changes. Appellants argue that reformation was contrary to Stanford's warranties in the real estate purchase contract that documents required to be delivered thereunder were "complete" and "true and correct." They point to the representation in the lease summary, which was given to Gatley, that states: "Rent shall be adjusted at the end of the 15th year to marketplace comparables"

In regard to the adjusted base rental, we have concluded that the trial court did not "reform" the lease when it determined the meaning of "rate most prevalent in the marketplace for a comparable property" and "shell building" but, rather, reasonably construed the language based upon relevant extrinsic evidence. The statement in the lease summary regarding adjustment of the rent to "marketplace comparables" was made in regard to the base rent[11] and the court determined that the base rent did adjust to the

[11] The lease summary also indicates that rent includes "35% of all gross rents over $1.50 to begin 4/1/86."

market rate for "comparable property," as contractually defined, at the end of the fifteenth year of the lease. The lease summary made no representations regarding the meaning of "shell building." In addition, the lease summary, an abbreviated statement of the lease terms, was delivered with the actual lease and lease amendments, which were "complete" and "true and correct" with regard to the adjustment of the base rental rate.[12] In this context, it is not evident that the lease summary materially misrepresented the adjusted base rental rate.

In any event, the court's conclusions are ambiguous, especially in light of its apparent finding that "[t]he Lease summary is consistent with the terms of the original Lease [and] with the 1986 and 1987 Amendments." It is not clear that the court found a discrepancy between the adjusted base rental rate and the rate represented by the lease summary.

As to overage rent, we have concluded that contract was not reasonably susceptible to a construction eliminating overage rent during the extended term (years 16 through 19) or to a construction necessarily barring overage rent as a component of the total "mutually agreeable rental" during any renewal term. We have also concluded that there was no basis for reforming the lease to eliminate overage rent during years 16 through 19. Lastly, we have concluded that it is premature for a court to determine the rental during any renewal term since the renewal option, assuming its enforceability, has not been exercised and the contractually agreed upon process for determining the "mutually agreeable rental" has not occurred.

In light of these conclusions, it is not evident that appellants are entitled to further relief against Stanford.

---

[12] The estoppel certificate signed by Arutunian says nothing about the meaning of "shell building" or the adjustment of the base rental rate.

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion. Parties shall bear their own costs on appeal.

_____

Elia, Acting P. J.

WE CONCUR:

_____

Wunderlich, J.

_____

Mihara, J.